IDAHO MINING CORP.

v.

DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 82-50-A Decided July 29, 1983

Appeal from a May 21, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) denying a request for the issuance of mining leases pursuant to the provisions of Mineral Prospecting Permit Contract No. 14-20-H53-313 on the Walker River Indian Reservation, Nevada.

Affirmed.

1. State Laws

   The status and rights of a dissolved corporation are to be determined with reference to the law of the state of incorporation.

2. Board of Indian Appeals: Jurisdiction--Rules of Practice: Appeals: Dismissal

   An appeal before the Board of Indian Appeals will not be dismissed on the grounds that the Board lacks authority to grant the relief requested when the appeal seeks review of legal prerequisites to the exercise of discretionary authority vested in the Bureau of Indian Affairs.

3. Indian Lands: Leases and Permits: Minerals

Although an application for a mining lease may result from exploration under a mineral prospecting permit, the application does not seek a continuation of existing rights within the meaning of 5 U.S.C. § 558(c) (1976).

4. Indian Lands: Leases and Permits: Minerals

The expiration of a mineral prospecting permit does not affect the right of the permittee to receive a mining lease for which timely application was made. The term of the prospecting permit is not extended by the filing of an application for a mining lease.

5. Indian Lands: Leases and Permits: Revocation or Cancellation

Cancellation procedures established in a prospecting permit of Indian trust land are not applicable when the permit expires by its own terms.

6. Indian Lands: Leases and Permits: Secretarial Approval

Regardless of expectations existing at the time a prospecting permit covering trust lands is approved, by approving the permit the Secretary does not relinquish his responsibility to review any subsequent mining lease application in order to determine whether the proposed lease is in the best interest of the Indians involved.

7. Indian Lands: Leases and Permits: Secretarial Approval

The Bureau of Indian Affairs properly disapproved a mining lease application when the applicant had failed, without explanation, to comply with a significant provision of its prospecting permit.

APPEARANCES: William G. Waldeck, Esq., and Amanda D. Bailey, Esq., Dufford, Waldeck, Ruland, Wise & Milburn, Grand Junction, Colorado, for appellant; Chedville L. Martin, Esq., Department of the Interior, Office of the Solicitor, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Idaho Mining Corporation (appellant) has sought review by the Board of Indian Appeals (Board) of a May 21, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) affirming a September 27, 1979, decision of the Assistant Area Director, Phoenix Area Office, Bureau of Indian Affairs (BIA). The decision denied appellant's request for approval of mining leases pursuant to the provisions of Mineral Prospecting Permit Contract No. 14-20-H53-313 (permit), on the Walker River Indian Reservation, Nevada. For the following reasons the Board affirms the Deputy Assistant Secretary's decision.

Background

On February 13, 1974, the Acting Superintendent, Nevada Indian Agency, BIA, approved the permit at issue in this case. The permit was between appellant and the Walker River Paiute Indian Tribe. In broad, uncontested outline, the permit granted appellant the right to prospect for certain minerals on most of the tribal reservation lands for 1 year for a consideration of $5,000. The permit could be extended upon payment of a $7,500 bonus (paragraph 1). Appellant could file an application for a mining lease or

leases on any lands covered by the permit at any time during the term of the permit (paragraph 2a). Appellant was required to expend at least $25,000 in prospecting and exploration work during the 1-year term of the permit (paragraph 2b).

Appellant received two extensions of the permit. The second extension provided that the permit would expire on or about February 13, 1978. 1/ By letter dated February 10, 1978, and received on February 13, 1978, appellant requested several mining leases pursuant to the permit. Appellee does not dispute that this request was timely filed during the term of the permit.

The Area Director, to whom the Superintendent referred the request for mining leases, wrote appellant on March 31, 1978. As pertinent to the issues raised in this appeal, that letter stated:

> The second matter concerns former Mineral Prospecting Permit, Contract No. 14-20-H53-313, which expired on February 12, 1978. Paragraph 2q of the former permit details the various reports required to be filed by your company in order to keep the Permitter, Superintendent, and Supervisor informed of your operations. Our records do not show that you have complied with the reporting requirements.
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> We request that you comply immediately with the provisions of the permit which require reports, and particularly with the requirement for "detailed and complete written reports of the prospecting done and all information concerning the nature and

1/ There is apparently confusion within BIA as to whether the permit expired on Feb. 12, 13, or 14, 1978. The original permit was approved on Feb. 13, 1974. The extensions are not part of the record submitted to the Board. BIA's failure to determine the precise expiration date is, however, harmless error under the circumstances of this case. BIA has conceded that the lease applications were timely filed. Although the due date for written reports required under paragraph 2q was established by the expiration date, the reports were submitted more than a year and a half late. Under such circumstances, the difference of a day or two becomes irrelevant.

> value of the minerals, including, but not limited to aerial photographs, geological and geophysical maps, drill cores, logs, assays, charts, or sections prepared on which the detailed and complete written reports are based," which were due on March 11, 1978.
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> Following receipt of the above information and after conducting field inspections of the premises we will respond appropriately to your request for leases.

On May 22, 1978, appellant replied to the Area Director's letter. Appellant informed the Area Director that it was "in the process of writing final reports on the prospecting done on the reservation which will make the data generated more meaningful to the Tribe for future use. We will be forwarding copies of the data and reports as soon as these reports are completed."

By letter dated September 27, 1979, more than a year later, the Assistant Area Director again wrote appellant. The letter stated that the reports required by paragraph 2q had still not been furnished and concluded:

> This office has determined that the failure of Idaho Mining Company to comply with the reporting requirements of Mineral Prospecting Permit Contract No. 14-20-H53-313 during the term of the permit and a reasonable period of time after its expiration constitutes a breach of that contract and that Idaho Mining Company has no residual rights under the terms of the permit, including the right to apply for leases on the former permitted area. Accordingly, we hereby deny Idaho Mining Company's request for such leases.

The letter further informed appellant of its right to appeal the determination.

On October 23, 1979, appellant wrote the Assistant Area Director, expressing astonishment that the lease applications were being denied and

referring to paragraph 2t of the permit which provided for a 30-day notice period of any alleged default during which the permittee might correct the default and/or request a hearing. Appellant further stated that it and its predecessors had expended over $1,250,000 under the permit and that it was "inequitable to attempt to cancel our applications for leases without due process and just cause." In the event that the Assistant Area Director declined to reinstate the lease applications, appellant informed him that the letter was to be considered an appeal.

Appellant furnished certain materials required by paragraph 2q of the permit to the BIA on October 26, 1979.

In accordance with instructions contained in a November 2, 1979, letter from the Assistant Area Director, appellant filed an appeal with the Commissioner of Indian Affairs on November 16, 1979.

In January 1981, while its appeal was pending, appellant was dissolved under the laws of Nevada, the State of its incorporation. All of the assets of the corporation, including any lease and permit rights on the Walker River Indian Reservation, were assigned to its stockholders. The permit assignment was submitted to the BIA for approval on January 2, 1981. The letter transmitting the assignment stated that "[t]he Assignment was necessitated as a matter of law because of the liquidation and dissolution of Idaho Mining Corporation." By letter dated February 11, 1981, the Assistant Area Director neither approved nor disapproved the assignment, but instead stated "that the above permit expired on February 14, 1978, and is no longer in force or effect."

The Deputy Assistant Secretary--Indian Affairs (Operations) 2/ issued a decision in the appeal on May 21, 1982. 3/ That decision, after a recitation of the facts of the case, stated at page 3:

> On October 26, 1979, a year and seven months after the BIA had requested the Appellant to comply "immediately" with the terms of the permit by submitting the required reports, and a year and eight months after the permit expired by its own terms, the Appellant submitted some data to the Phoenix Area Office.
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> In its appeal the Appellant offers no explanation for the extended delay in submitting the required reports after being informed that the BIA would take no action on its request for leases until the reports were received. Instead, the Appellant contends that he is entitled to the leases as a matter of right, and the Area Director's decision should be reversed because that officer failed to comply with certain procedural requirements of the permit. I am not persuaded by the Appellant's arguments.

The decision then found that paragraph 2a of the permit did not grant appellant a "right" to a lease; paragraph 2a did not limit the Secretary's right to refuse to approve a proposed lease to the one circumstance where the environmental impact as shown by an environmental assessment was so great as to outweigh all other considerations; the Area Director did not fail to follow

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2/ The administrative review functions of the vacant office of Commissioner of Indian Affairs were assigned to the Deputy Assistant Secretary--Indian Affairs (Operations) by memorandum of May 15, 1981, signed by the Assistant Secretary for Indian Affairs.

3/ The Board notes that this appeal was pending before the Deputy Assistant Secretary from November 1979 until May 1982. Under 25 CFR 2.19, the Deputy Assistant Secretary is required either to issue a decision in cases appealed to him within 30 days from the date they are ready for decision, or to refer the case to the Board. The Board, in discussing this provision, has held that when an appellant acquiesces in BIA's failure to render a timely decision, the decision ultimately issued will not be held void. Urban Indian Council, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 146 (1983). However, the effect on the Indians involved of BIA's failure to comply with this requirement by either rendering a decision or referring the case to the Board with due diligence should be considered. Such dilatoriness does not comport well with BIA's trust responsibilities. Sessions, Inc. v. Morton, 348 F. Supp. 694, 703 (C.D. Cal. 1972).

the permit cancellation procedures because the permit was not canceled, but rather expired by its own terms on February 13, 1978; and the right of first refusal for a 10-year period following disapproval of a proposed lease, found in paragraph 2a, applied only when the proposed lease was not approved because of environmental concerns.

Pursuant to the appeals procedure outlined in the Deputy Assistant Secretary's decision, appellant filed a notice of appeal with the Board. Briefs were filed by both parties. On December 27, 1982, the Board received a supplemental answer from appellee indicating that he had just become aware that appellant had been dissolved. The answer moved that the appeal be dismissed on the grounds that the appeal could not be maintained in the name of a nonexistent corporation and the stockholders should not be substituted. Furthermore, appellee moved for dismissal on the grounds that the Board was without authority to grant the relief requested, i.e., an order directing the Walker River Paiute Tribe to issue a lease of tribal lands and a directive that the lease be approved by BIA. Appellant opposed both motions to dismiss.

Appellee's Motions to Dismiss

Appellee first moves that the case be dismissed on the grounds that appellant is a nonexistent corporation and the appeal cannot be continued in its name. Appellant responds that under the laws of Nevada, dissolved corporations "continue as bodies corporate for the purpose of prosecuting and defending suits, actions, proceedings and claims of any kind or character by or against them, but not for the purpose of continuing the business for

which the corporation shall have been established." Nev. Rev. stat. § 78-585 (1979).

[1] Appellee correctly states the general common law rule that the dissolution of a corporation ends its existence for all purposes, including maintenance of suits in its name. See 19 Am. Jur. 2d Corporations §§ 1646, 1662, 1673 (1965); 19 C.J.S. Corporations §§ 1727, 1736 (1940). However, in most jurisdictions the common law rule has been changed by legislation intended to permit the corporation to wind up its affairs in an orderly manner. Appellant asserts that Nevada law provides for the continuation of corporate existence after dissolution for, inter alia, "the purpose of prosecuting claims of any kind or character." Appellee has not suggested that appellant has misstated or misrepresented Nevada law. The Board has no independent knowledge that Nevada law is different than cited by appellant. Cf. Estate of Robert R. Monroe, 9 IBIA 67, 69 n.3 (1981).

Therefore, the Board finds that under Nevada law appellant retains the right to prosecute the present appeal in its own name following dissolution. Appellee's first ground for dismissal is denied. 4/

Appellee's second ground for dismissal is that the Board lacks authority to grant the relief requested. The Board has previously dismissed cases for this reason. See Zarr v. Acting Deputy Director, Office of Indian Education Programs, 11 IBIA 174, 90 I.D. 172 (1983) (dismissal sought by joint motion of parties; seeking declaration that Departmental regulations exceeded

4/ Because of this holding the Board does not reach the issue of whether appellant's stockholders should be substituted for appellant.

statutory authority and that statute was unconstitutional); Lord v. Commissioner of Indian Affairs, 11 IBIA 51 (1983) (seeking money damages against BIA).

[2] In this case, appellee argues that the Board lacks authority because appellant asks the Board to order BIA to undertake an allegedly discretionary action. The Board has held that it has the authority and the responsibility to review BIA actions for legal sufficiency even though the ultimate decision in a case might be discretionary. See Urban Indian Council, Inc., supra; Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 21, 89 I.D. 655 (1982); Aleutian/Pribilof Islands Association, Inc. v. Acting Deputy Assistant Secretary-- Indian Affairs (Operations), 9 IBIA 254, 89 I.D. 196 (1982). In such cases, the Board will set forth the proper legal standard to be followed in reaching the decision and remand the case to BIA under 43 CFR 4.337(b) for the exercise of discretion.

Therefore, appellee's second ground for dismissal is also denied. If the Board finds that the resolution of any issue raised in this case requires the exercise of discretion vested in BIA, the case will be remanded.

Issues on Appeal

Appellant raises the following issues in this appeal: (1) Whether BIA erred in finding that the prospecting permit expired by its own terms on or about February 13, 1978; (2) whether BIA erred in failing to follow the cancellation procedures set forth in paragraphs 2k and 2t of the permit;

(3) whether appellant has an absolute right to mining leases or to reconsideration of its lease applications; and (4) whether, even if appellant has no absolute right to a lease, it has a 10-year right of first refusal of any lease offered to another person.

Discussion and Conclusions

[3] Appellant first argues that its prospecting permit did not expire by its own terms on or about February 13, 1978, but rather was continued by 5 U.S.C. § 558(c) (1976). Section 558(c) states in its entirety:

> When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given--
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> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
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> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.
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> When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

The Board acknowledges that appellant is an applicant for a license within the meaning of the first sentence of section 558(c). Therefore, it is entitled to proper consideration of that application. Appellant further

argues that it "made timely and sufficient application for a renewal or a license in accordance with agency rules" and that, consequently, its application for a mining lease extended the term of its prospecting permit, because the permit applied "to an activity of a continuing nature." 5/

Had appellant applied for an extension of its prospecting permit, this argument might have merit. In such case, it appears that section 558(c) would require that the expiring permit continue in force until the extension request could be considered. 6/ Appellant, however, applied not for a mere license but a mining lease. Although the lease application was an outgrowth of the prospecting permit, the application sought new rights, such as the right to take the profits of land, rather than a continuation of existing prospecting privileges.

[4] In a similar situation, the Interior Board of Land Appeals, in discussing coal prospecting permits issued under 30 U.S.C. § 201 (1970), refused "to indulge in the fiction that the [prospecting] permits survived beyond their expiration dates in order to maintain the right to receive any leases earned by virtue of work done and mineral discoveries made during the viable terms of the permits." Instead, the Land Board found that "[t]he expiration of a prospecting permit has no effect on the right of the permittee to receive a preference right lease for which timely application was

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5/ Appellant correctly does not allege that its prospecting permit was withdrawn, suspended, revoked, or annulled.

6/ See, e.g., Pan-Atlantic S.S. Corp. v. Atlantic Coast Line R.R., 353 U.S. 436 (1957).

"Section 9(b) of the Administrative Procedure Act is a direction to the various agencies. By its terms there must be a license outstanding; it must cover activities of a continuing nature; there must have been filed a timely and sufficient application to continue the existing operation; and the application for the new or extended license must not have been finally determined." 353 U.S. at 439.

made." Utah Power & Light Co., 14 IBLA 372, 374 (1974). Although in Utah Power, the prospecting permits expired at the end of a period prescribed by statute, the Board does not find this to be a substantive distinction from a permit which expires by its own terms. The Board agrees with the reasoning in the Utah Power case and finds no justification for departing from this agency precedent.

The Board affirms that part of appellee's decision finding that appellant's prospecting permit expired by its own terms on or about February 13, 1978. The expiration of this permit in no way affected appellant's right to due consideration of its lease applications. Because the lease applications did not seek extension or preservation of continuing rights arising from the prospecting permit, 5 U.S.C. § 558(c) (1976) does not apply.

[5] Because of this conclusion, the Board also affirms appellee's finding that the prospecting permit was not canceled in violation of procedures set forth in paragraphs 2k and 2t of the permit. Because the permit expired by its own terms, BIA was not required to take any action under these procedures.

Appellant's third argument is that, regardless of the current status of the permit, that permit gave it an absolute right to a mining lease if the lease was requested during the term of the permit. In support of this argument, appellant furnished affidavits from various individuals, including BIA personnel and a tribal official, indicating that all parties expected that a lease would follow from the permit.

In particular, appellant's affidavits suggest that the language of paragraph 2a of the permit, relating to a "privilege * * * to apply * * * for a lease," and suggesting that disapproval of a lease application was possible, was added in response to the decision in Davis v. Morton, 469 F.2d 593 (10th Cir. 1972), which held that leases of Indian trust land were subject to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4361 (1976). Appellant argues that all present language in paragraph 2a indicating that BIA might not approve a lease relates to the sole situation so severe that mining could not be justified under NEPA. 7/

The essence of appellant's argument is that the Secretary retained no authority under this prospecting permit to decline to approve a mining lease on any except environmental grounds. The record does suggest that the parties to the permit anticipated that the permit would mature into a lease. Anticipations, however, can be defeated by changed circumstances. Appellant's argument would require that, even if appellant had seriously breached the conditions of the permit and BIA had initiated procedures to cancel the permit, BIA would still be required to issue appellant a mining lease so long as the application was filed before the cancellation became final. The Board will not adopt this argument.

[6] The Board holds that, although the parties to this permit expected that a mining lease would eventually be issued to appellant, the Secretary did not relinquish his authority to review the lease application and to make

2/ Appellant further argues that the $25,000 required annual expenditure for exploration indicates the intent of the parties to permit it to recoup this outlay through eventual mining.

an independent determination at the time the application was filed as to whether the proposed lease was in the best interests of the Walker River Paiute Indian Tribe. Accordingly, the Board affirms appellee's decision that appellant's prospecting permit did not give it an absolute right to a mining lease.

[7] Furthermore, BIA appears to have acted in the best interests of the Indian tribe when it declined to approve appellant's lease applications. Appellant was informed on March 31, 1978, that its prospecting permit had expired 8/ and that the reports required by paragraph 2q were past due. Appellant delayed more than 18 months in providing the required reports and raw data to BIA and the tribe. In fact, the information was only submitted after BIA informed appellant that its lease applications were being denied because of its failure to comply with this requirement.

8/ Appellant's allegation that BIA gave it no indication in its Mar. 31, 1978, letter that the permit had expired is incorrect (see Appellant's opening brief at 5). The letter, quoted, supra, in the background section of this opinion, clearly referred to "former Mineral Prospecting Permit, Contract No. 14-20-H53-313, which expired on February 12, 1978." Furthermore, the major purpose of the March letter was to inform appellant that specific reports should be submitted immediately because they were already past due under the terms of the permit. The letter quoted the language of paragraph 2q of the permit requiring the submission of reports and raw data compiled during the term of the permit. The permit provides that the specific information requested by BIA was due "within thirty (30) days after the termination of the permit." BIA stated that the information had been due on Mar. 11, 1978. Appellant was thus on notice that BIA considered the permit to have expired 30 days prior to Mar. 11, 1978. Appellant did not question BIA's assertion that the reports were due as would be expected if appellant felt that the permit was still in force.

Similarly, the Board rejects appellant's contention that BIA gave it no date when this information was due (see Appellant's opening brief at 8). The permit told appellant that the reports were due within 30 days from the termination of the permit. On Mar. 31, 1978, BIA told appellant that the submission was past due and should be provided "immediately."

Whether or not these reports and data were necessary to BIA's consideration of appellant's lease applications, they were, nevertheless, an extremely important requirement under the prospecting permit. The information required was intended to provide the tribe with knowledge of the extent and location of any mineral deposits on tribal reservation lands. Failure to provide this information constituted serious harm to the tribe. The permit clearly stated that in applying for mining leases, "time [was] of the essence" (paragraph 2a). Appellant's unreasonable and unexplained delay of over a year and a half in providing this information showed total disregard of its contractual obligations and constituted sufficient grounds for a BIA determination that the issuance of mining leases to appellant would not be in the tribe' s best interests.

The Board finds that appellee acted properly in upholding the denial of mining leases to appellant. Therefore, the Board will not order BIA to reconsider this decision. Finally, appellant argues that, even if the prospecting permit did not give it an absolute right to a mining lease, it provided a 10-year right of first refusal on any mining lease offered to any other person. Appellant bases this argument on paragraph 2a of the permit which states:

> If the Secretary refuses to approve a proposed lease or leases as provided above, he shall not subsequently for a period of ten (10) years approve a lease or leases to any other person or entity for mining on any of the land covered by the lease application unless a lease or leases containing the identical terms and conditions as those to be given to any other person or entity is first offered to and rejected by the Permittee.

Appellee held that this right of first refusal applied only in the case where a lease application was not approved on the grounds of environmental concerns.

Appellant argues that it applies in any case of a refusal to approve an application.

The Board first notes that appellant's argument on this issue is inconsistent with its argument that the Secretary had the authority to disapprove a lease application only on the ground of environmental concerns. Furthermore, appellant's own affidavits indicate that this paragraph was one of those added to the permit as a result of Davis, supra, a fact which supports appellee's decision.

Regardless of these considerations, the Board finds that the language quoted, although not without some ambiguity if read without reference to the development of the permit terms, can and should be interpreted in the manner held by the Deputy Assistant Secretary. Any other reading of the language would again require BIA to approve a lease to appellant even though such a lease might not be in the best interests of the tribe. Under appellant's argument, even if a lease proposed by appellant had been disapproved on the grounds of failure to comply with the terms of the permit or demonstrated disregard for the rights of the tribe or tribal members, BIA would still be required to give appellant a right of first refusal on any subsequently negotiated lease of the land. The Board will not hold that the Secretary's authority to supervise the administration of Indian leases can be so limited.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the May 21, 1982,

decision of the Deputy Assistant Secretary--Indian Affairs (Operations) in this case is affirmed in total.

Wm. Philip Horton
Chief Administrative Judge

We concur:

Jerry Muskrat
Administrative Judge

Franklin D. Arness
Administrative Judge